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No. 86-525 (2)

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

PAN AMERICAN WORLD AIRWAYS, INC.,
Petitioner,

VS.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.
AND RELATED CROSS AND THIRD PARTY ACTIONS.

OPPOSITION OF FORMER PAN AMERICAN PILOTS/CLAIMANTS TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SANFORD JAY ROSEN
(Counsel of Record)
BARBARA Y. PHILLIPS
ROSEN & PHILLIPS
155 Montgomery Street, 8th Floor
San Francisco, CA 94104
Telephone: (415) 433-6830

JAMES C. STURDEVANT
STURDEVANT & ELION
120 Montgomery Street, Suite 1800
San Francisco, CA 94104-4321
Telephone: (415) 392-4140
Attorneys for Former Pan American Pilots/Claimants,

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

8 A 1 P

QUESTIONS PRESENTED

1. Can a defendant in an Age Discrimination in Employment Act ("ADEA") case appeal under 28 U.S.C. § 1292(a)(1) from a district court's interlocutory order denying a motion joined by plaintiff, the EEOC, to enter a consent decree containing injunctive and monetary relief that would settle the entire action where: (1) the plaintiff-appellee opposes the appeal, and (2) the ADEA injunctive relief was directed against the defendant-appellant?

2. Can defendant appeal rejection of the consent decree as an appeal from a "collateral order" under 28 U.S.C. § 1291, where the defendant was not barred from settling the lawsuit for the same or similar injunctive relief that was included in the rejected consent decree?

LIST OF PARTIES

The Petitioner is Pan American World Airways, Inc. It was defendant and Appellant below.

The Equal Employment Opportunity Commission (EEOC) is a Respondent here and was plaintiff and an Appellee below.

The National Airlines Chapter of the Flight Engineers' International Association (FEIA) is a Respondent here and was an Appellee and Intervenor-Objector below.

Former Pan American Pilots/Claimants William E. Bacheler, Charles Baer, John W. Bateman, William L. Bay, Carl E. Benson, D.R. Berg, John R. Brons, Deaderick G. Browne, John C. Burn, W.R. Chamberlin, Norman C. Christiansen, Wayne E. Cook, Jerry Crance, Joseph Davis, Jr., Francis X. Duffy, Joseph Dupre, Ray Egan, Melvin J. Fuller, Charles R. Gordon, Joseph Greely, Edwin F. Herr, Sumner K.

Hushing, William R. Jordan, Edward A. Karasek, James E. Kowing, Fred Landa, Richard Mayhew, Frank McColgin, Henry McFail, Fred McLaughlin, Robert McMurray, Merlin H. Mills, Daniel B. Mulholland, J.C. Musser, James C. Nelson, Victor Nittolo, Raymond Pearson, Herbert G. Petty, Wilbur W. Pickering, John L. Raabe, Warren H. Roberts, Darrell Rogers, William J. Rooney, Gerald B. Ross, Raymond J. Russell, Jr., Elliott Schreider, John F. Scott, Edward Shaffer, Dwight L. Shrum, Charles A. Smith, Lennart Thorell, George Tondorf, Claude R. Turner by his estate, F.D. Vanderhoof, Elvin Voges, Harlow Willard and Robert Wyland (who constitute 57 of the 81 ADEA pilot-claimants involved in this action) are Respondents here, and were Appellees and Intervenor-Objectors below.

The remaining ADEA claimants are Eugene R. Banning, George Blackford,

Gordon S. Burchett, Francis Colbert, Richard B. Fenimore, A.E. Fritz, Charles Hawkins, Arthur E. Hillier, Blake Hirsh, Roy F. Hutchinson, Fred Knotts, W.K. Langhorne, Robert D. Larsen, Fred Linari, W.G. Morey, Robert K. Polson, R.P. Reynolds, Joseph F. Ross, Joseph B. Sceili,* Thuel V. Schuhart,* Edwin W. Sippel, G.E. Taylor, Arthur P. Valla, and Richard W. Willis.* (The ones who have asterisks next to their names submitted pro se objections to the consent decree in the district court and are unrepresented by the undersigned.)

The Airline Pilots Association (ALPA) was a Rule 19(a), F. R. Civ. P. defendant in the district court, and took no position in the court of appeals.

The Pan American Chapter of the Flight Engineers International Association (FEIA) was a Rule 19(a), F. R. Civ. P. defendant in the district court

and took no position in the court of appeals.

A group of former National Airlines pilots, represented by Captains Charles Caudle and Vincent Wynne, were Intervenor-Objectors in the district court. They took no position in the court of appeals.

A group of Pan American furloughees, represented by A.M. Rankin, were Intervenor-Objectors in the district court. They took no position in the court of appeals.

Counsel for all parties are identified in the proof of service.

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No. 86-525

IN THE

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OCTOBER TERM, 1986

PAN AMERICAN WORLD AIRWAYS, INC.,

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

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OPPOSITION OF FORMER PAN AMERICAN PILOTS/CLAIMANTS TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The 57 former Pan American Pilot claimants represented by the undersigned counsel respectfully request that this Court deny the Petition for Writ of Certiorari. They contend that no grounds exist for granting a Writ of Certiorari to review this interlocutory appeal as:

(1) The court of appeals correctly held that the district court order refusing to enter the consent decree was not appealable because the appealing party, defendant Pan Am, was not denied injunctive relief as contemplated under 28 U.S.C. § 1292(a)(1), and the order was not a "collateral order" appealable under 28 U.S.C. § 1291; (2) The court of appeal's decision did not conflict with the decision of this Court in Carson v. American Brands, Inc., 450 U.S. 79 (1981); (3) There is no conflict among the circuits on a significant, important or recurring question, either under 28 U.S.C. § 1292(a)(2) or the "collateral order" doctrine under 28 U.S.C. § 1291; (4) The court of appeals' holding in this case depends upon the special facts in this case including, inter alia, the fact that plaintiff, the Equal Employment

Opportunity Commission ("EEOC"), Pan Am's co-proponent of the consent decree in the district court, abandoned the consent decree on appeal, and argued for affirmance of the district court's order rejecting the consent decree (see Append. hereto at A 15-18); and (5) The consent decree proffered by Pan Am and the EEOC on its face was plainly inadequate, especially in light of this Court's decisions in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 83 L.Ed.2d 523 (1985), and Western Airlines, Inc. v. Criswell, ___ U.S. ___, 86 L.Ed.2d 321 (1985), and was properly rejected by the district court.

OPINIONS BELOW

The August 8, 1986 per curiam opinion of the court of appeals is

reported at 796 F.2d 314 and is reprinted in the Appendix to the Petition (A 1-7).

The October 22, 1985 opinion of the United States District Court for the Northern District of California is reported at 622 F.Supp. 633 and is reprinted in the Appendix to the Petition (A 8-34).

The March 6, 1984 opinion of the district court is not officially reported. However, it is reported at 34 Fair Empl. Prac. Cas. (BNA) 321, and is reprinted in the Appendix hereto (A 1-13).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on August 8, 1986. This Court has jurisdiction to review the judgment of the Ninth Circuit under

28 U.S.C. § 1254(1) (1982). These Respondents respectfully request that this Court, in exercising its judicial discretion, deny the Petition.

STATUTES INVOLVED

28 U.S.C. § 1292(a)(1) provides, in relevant part, that "the courts of appeals shall have jurisdiction of appeals from ... [i]nterlocutory orders of the district courts of the United States ... granting, continuing, modifying, refusing, or dissolving injunctions, or refusing to dissolve or modify injunctions."

28 U.S.C. § 1291 provides in relevant part that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States."

STATEMENT OF THE CASE

This representative action under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-33a was filed by the EEOC against Pan Am in September 1981, alleging that Pan Am discriminated against pilots desiring to serve as Flight Engineers past the age of 60. The Airline Pilots Association ("ALPA") and the Flight Engineers International Association ("FEIA"), certified collective bargaining Pan Am pilots and flight engineers were joined as Rule 19(a) F. R. Civ. P. defendants.

The EEOC sought back pay, reinstatement of claimants as Flight Engineers, injunctive and declaratory relief and liquidated damages. At present, 81 former pilots ("claimants") between the ages of 65 and 70 or the estates of

some of them are subject to the outcome of this litigation.

In 1962 and 1963, Pan Am entered into written agreements called "Crew Complement Agreements" with ALPA and FEIA. These agreements provided that all newly-hired Flight Engineers would be required to possess pilot qualifications and be placed on the Pilot System Seniority List. Thus, all new Flight Engineer positions were to be filled by pilot-qualified Flight Engineers, who were entitled to bid for pilot positions. The non-pilot Flight Engineers, then employed by Pan Am, were "grandfathered" on the top of the Flight Engineers' duty roster, as identified on Appendix A to the Crew Complement Agreements.

In response to the 1978 amendments to the ADEA, Pan Am allowed "Appendix A" Flight Engineers to continue flying past

age 60. Since 1978, more than 70 "Appendix A" Pan Am Flight Engineers have continued to serve past the age of 60. Non-Appendix A, or pilot-qualified Flight Engineers, were not permitted to continue flying as Flight Engineers past age 60.

Since adoption of the Crew Complement Agreements, pilots at Pan Am have been permitted to downbid to a Flight Engineer vacancy and are permitted to "bump" Flight Engineers in lieu of furlough (layoff). Further, Pan Am has permitted at least one pilot a medical "hardship" downbid to Flight Engineer. In addition, two former Pan Am command pilots, Otto Kiehl and Joseph Hazelwood, who were working as Flight Engineers at the time of their forced retirement at age 60, returned to work pursuant to a Consent Decree entered in Kiehl v. Pan

Am, No. C-81-4274 WAI (N.D. Cal. 1983). Finally, on February 25, 1983, Pan Am announced a new policy of permitting pilots who bid for and were awarded Flight Engineer vacancies and started training before the first month following their 60th birthdays to remain as Flight Engineers until the age of 70. Pan Am admits that a number of pilots approaching age 60 have now bid for and been awarded Flight Engineer vacancies and have served as such after reaching age 60.

A. The First Proposed Consent Decree

In May 1983, Pan Am and the EEOC moved for entry of a proposed Consent Decree in this case. Claimant Raymond L. Russell, Jr. was permitted to intervene for the purpose of objecting to that proposed 1983 Consent Decree. Several

other pilots objected as well. Russell's motion to intervene with full party status was denied without prejudice.[1/]

Under the terms of the 1983 Consent Decree, each claimant was forced to elect whether to return to Pan Am as a Flight Engineer or to receive $4,000 to $5,000, out of a settlement fund of $250,000, as full compensation for his involuntary termination by Pan Am at age 60.

After considering objections from a number of former pilot ADEA-claimants and other groups, the district court rejected the 1983 Consent Decree. The court, noting the grant of review by the this Court in Airline Pilots Association v.

1/ Russell has his own related duty of fair representation and contract breach lawsuit pending in the district court, Russell v. ALPA, U.S.D.C., N.D. Cal. No. C 81 4590-RFP.

Trans World Airlines, 713 F.2d 940 (2nd Cir. 1983), cert. granted, 465 U.S. 1065 (1984), expressed its reluctance "to venture into unchartered waters." Append. hereto at A 12-13.[2/]

On June 5, 1984, Pan Am filed and served its notice of appeal, seeking only remand to the district court with instructions to pass upon the merits of the 1983 Consent Decree. The EEOC did not appeal, "because it 'believed that the process of resolving the case and returning the aging pilots to work would be accomplished more quickly by trial.'" Pet. Append. at A 16. Motions to dismiss the appeal for lack of appellate

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2/ The district court was also aware of the Ninth Circuit's decision, favorable to ADEA claimants, in Criswell v. Western Airlines, Etc., 514 F.Supp. 384 (C.D. Cal. 1981), aff'd, 709 F.2d 544 (9th Cir. 1983). Append. hereto at A 12.

jurisdiction were consolidated with the merits.

On February 11, 1985, on Pan Am's motion, the court of appeals entered an Order granting limited remand to allow the district court to reconsider its refusal to enter a consent decree or to consider the entry of a modified decree.

B. The Revised Consent Decree

On July 3, 1985, Pan Am and the EEOC jointly moved for approval of a revised proposed consent decree. According to them, the 1985 Consent Decree was "virtually identical" to the 1983 version. Their motion was made after, but did not refer to, this Court's decision in Western Airlines, Inc. v. Criswell, __ U.S. __, 86 L.Ed.2d 321 (1985).

Unlike the 1983 Consent Decree, the 1985 Consent Decree did not require former pilots to elect between returning to Pan Am as a Flight Engineer or sharing in the monetary recovery. The living claimants can seek reinstatement and all 81 claimants would share in $1.5 million as full settlement of all claims against Pan Am. Each claimant would have received approximately $300 for each month of involuntary retirement, paid in three installments over two years, without interest.

Pan Am's potential liability for back pay alone at that time was more than $26 million. Pet. Append. at A 22. Further, the record is replete with compelling evidence that, with the passage of many years since their involuntary retirement at age 60, many claimants can no longer make the

transition to Flight Engineer, although they would have been able to do so at age 60 before retiring. See Pet. Append. at A 21, A 23. And, the presence in this action of Mrs. Lou Ann Turner, Trustee for the Trust of Claude R. Turner, demonstrates that for some pilots there can only be some monetary compensation to their estates.

Other inadequacies of the 1985 Consent Decree include, inter alia, the following: (1) For purposes of competing with other active Flight Engineers, the seniority of any claimant who is reinstated will be limited to the seniority accrued as of his normal retirement date at age 60. (2) In the future, Pan Am will allow pilots reaching the age of 60 to be placed in the position of Flight Engineer only if they indicate their elections to do so prior

to reaching age 59½. But cf., Trans World Airlines, Inc. v. Thurston, supra, 83 L.Ed.2d at 532.

By comparison with the benefits offered in the 1985 Consent Decree, former Pan Am Pilots Kiehl and Hazelwood settled their case in 1983 for full back pay of $90,000 and $45,000, respectively, the opportunity to recommence employment with Pan Am at full pay, full seniority rights as Pan Am Flight Engineers as if they had not retired at age 60, and attorneys' fees.

C. The Proceedings in the District Court

More then 40 claimants were granted leave to intervene for the purpose of

objecting to the terms of the decree. Pet. Append. at A 20, A 32-33.[3/] They contended that, in light of the two unanimous decisions of this Court in 1985 involving TWA (Thurston) and Western Airlines (Criswell), the 1985 Consent Decree was inappropriate, unfair, unjust and unreasonable, especially with respect to monetary relief for the claimants.

In their July 3, 1985 Joint Application for Entry of Consent Decree, Pan Am and the EEOC declared that: "The essential question before the Court at

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3/ In addition, 6 claimants submitted pro se their objections to the district court. Three of them have since retained the undersigned counsel to oppose the 1985 proposed Consent Decree and to protect their interests. The undersigned presently represent 57 objectors; in addition, three of the pro se objectors in the district court have not retained separate counsel. This makes a present total of 60 objectors, or nearly 75% of the claimants.

this time is '... whether the [proposed settlement] is fundamentally fair or just?' Moore v. City of San Jose, 615 F.2d 1265, 1271 (9th Cir. 1980)" (a Title VII class action lawsuit). They also specifically asserted that their proposed settlement was "an appropriate, fair and just resolution" of the case.

D. District Court Opinion

On October 21, 1985, the district court, in a comprehensive opinion, refused to approve the 1985 Consent Decree. Pet. Append. at A 8-34. It disagreed with the EEOC's contention that the EEOC was bound to adhere to the terms of the 1983 Consent Decree. Id. at A 15-17. It concluded that, even if the parties were so bound, the court was not obliged "to blind itself to recent court decisions that affect the reasonableness

of the decree." Id. at A 16. It further reasoned that, since a consent decree bears the imprimatur of the court, the court ought not lend its authority to a decree that is not fair, adequate and reasonable. Id. at A 17-20. That determination, it said, "involves balancing several factors including the strength of plaintiff's case; the risk of continued litigation; the presence of a governmental participant; and the amount offered in settlement." Id. at A 20.[4/]

The district court evaluated both the injunctive and monetary relief in the 1985 Consent Decree. It had little quarrel with the adequacy of the

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4/ While the district court noted that the government's participation should be given weight, for numerous reasons, it did not find that factor to be dispositive. Id. at A 18-20.

injunctive relief. Id. at A 20-32. Regarding the monetary award, the court found that, as of August 1985, Pan Am was potentially liable for $26.7 million for back pay alone,[5/] without considering inflation, potential front pay liability, pre-judgment interest or a possible award of liquidated damages,[6/] and that Pan Am

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5/ It found that Pan Am incurred an additional $330,000 of potential liability for salary each month. Id. at A 22. Hence, the additional potential back pay liability is now approximately $4.5 million, for a total of more than $31 million.

6/ The court noted that, as revealed in Thurston, TWA had attempted to comply with the 1978 amendments, had adopted a policy permitting 60 year old pilots in flight engineer status to continue working, and "within months after Congress amended the ADEA, TWA permitted pilots to bid for flight engineer vacancies...." It observed that, "in sharp contrast" Pan Am made no attempt to alter its policy toward pilots until five years after the amendments. Id. at A 23-24.

conceded that its liability could be $20 million. Id. at A 22-24. Whether the proposed installment award of $1.5 million was a fair compromise of claimants' potential recovery, the court concluded, depended upon the strength of the underlying claim. Id. at A 24.

The district court, therefore, carefully analyzed this Court's opinion in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 83 L.Ed.2d 523 (1985), and compared that case's facts to the facts of this case. It found that "Pan Am's policy regarding a pilot's ability to bump a flight engineer seems directly analogous to TWA's." Pet. Append. at A 26. Since this Court found that TWA's policy violated the ADEA, the district court found plaintiff's likelihood of success to be high, and the risk of continued litigation low. Id. at

A 24-29. See also id. at A 27-29, discussing Criswell.[7/] It concluded that the 1985 Consent Decree did not adequately compensate claimants and, accordingly, disapproved it. Id. at A 34.

7/ The district court also found Pan Am's reliance on Johnson v. American Airlines, 745 F.2d 988 (5th Cir. 1984), cert. denied, __ U.S. ___, 105 S.Ct. 3500 (1985), for the proposition that its policy is designed to avoid "command syndrome," and thus constitutes a BFOQ defense, to be misplaced. It noted that Johnson was decided before Thurston, that Thurston held that employers cannot make out a BFOQ defense when, because of age, they deny employees privileges they give to other employees, and that Pan Am permits numerous exceptions to its general policy of preventing senior pilots from flying as flight engineers. It also observed that plaintiffs in Johnson had made no motions for directed verdict or JNOV, which the court of appeals in that case held strictly limited the scope of its appellate review. See Pet. Append. at A 27-29.

E. The Court of Appeals Proceedings and Decision

On November 22, 1985 Pan Am appealed the district court's refusal to enter the consent decree. Again, the EEOC did not appeal. (This fact was not noted by Pan Am in its Petition for Writ of Certiorari.)

The case was argued to the court of appeals on July 17, 1986.[8/] It issued its per curiam opinion, holding that appellate jurisdiction was lacking, just three weeks later, on August 8, 1986.

It held that no appellate jurisdiction existed under 28 U.S.C. § 1292(a)(1) over the district court's interlocutory order as one denying injunctive relief. It held that Pan Am

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8/ The undersigned successfully moved to expedite the appeal.

failed to meet two of the three requirements set by this Court in Carson v. American Brands, Inc., 450 U.S. 79 (1981), for appellate jurisdiction under section 1292 (a)(2). According to the court of appeals, these requirements are:

> First, the interlocutory order must have the practical effect of denying an injunction. Second, the order must have "serious, perhaps irreparable, consequence." Finally, the order must be one that can be "effectively challenged" only by immediate appeal.
>
> Pet. Append. at A 4 (citations omitted).

As the court of appeals held with respect to this case:

> Pan Am fails to meet the "denial of injunction" requirement of Carson. Although the disapproved consent decree clearly involved injunctive relief (primarily the modification of Pan Am's cockpit staffing policies), that injunctive relief was sought by the appellee EEOC, not by

> appellant Pan Am. See Liberty Mutual Insurance Co. v. Wetzel, 424 U.S. 737, 744-45 (1976) (holding jurisdiction lies under section 1292 (a)(1) only if the party taking the appeal was denied injunctive relief).
>
> Id. at A 4(-5) (emphasis in original).

The court of appeals also held that Pan Am had failed to meet the "serious, perhaps irreparable, consequence" requirement of Carson. Id. at A 5-6. Unlike the situation in Carson, the district court's refusal to enter the consent decree here did not necessarily force the parties to trial. Disapproval of the 1985 Consent Decree was not on broad grounds that negated all other settlement possibilities. Id. at A 5-6. Pan Am simply was denied the ability to settle the entire action by making inadequate cash payment to the former pilot-claimants. There was no

disapproval of the liability basis or scope of the settlement otherwise. Compare Carson, supra.[9/]

The court of appeals also held that the Carson decision "was clearly intended to provide a definitive basis and standard for such interlocutory appeals" from district court orders disapproving consent decrees. Pet. Append. A 7 n.7. Hence, the court of appeals concluded that Carson, in effect, overruled its earlier decision in Norman v. McKee, 431 F.2d 769, 772-74 (9th Cir. 1970), cert. denied, 401 U.S. 912 (1971), allowing such an appeal pursuant to 28 U.S.C. § 1291 under the "collateral order" doctrine. Pet. Append. A 7 n.7.

9/ The court of appeals found it unnecessary to address the third Carson requirement, "that the order be one that

(Footnote Continued)

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. This Case, Which Involves an Unusual Factual and Procedural Setting, Presents No Significant Or Important Recurring Issue of the Appealability Under 28 U.S.C. § 1291 or § 1292(a)(1) of District Court Orders Refusing to Enter Consent Decrees Or Concerning Any Policy That Favors Voluntary Settlement of ADEA Cases.

A. This Case Presents No Significant or Important Recurring Issue of Law.

The instant case presents an unusual non-recurring situation. Two parties, plaintiff and principal defendant, attempted to settle their lawsuit, not once but twice. Each time they jointly presented their settlement in the form of a consent decree for entry by the district court as a judgment. Each time,

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(Footnote Continued)

can be effectively challenged only on immediate appeal." Id. at A 6 n.6

largely at the instance of former pilots/claimants, the actual fiscal beneficiaries of the plaintiff's claims, the district court rejected the settlement.

The first rejection came because Judge William A. Ingram believed the law was too uncertain for him to evaluate the settlement, as this Court was about to review controlling issues of law in the Thurston case.

Defendant Pan Am appealed, seeking a Ninth Circuit order requiring only that the district court rule on the merits of the proffered settlement. Plaintiff, the EEOC, did not appeal. After this Court decided Thurston, significantly strengthening plaintiff's legal position, Pan Am moved to remand the case to the district court for reconsideration of the

1983 Consent Decree or a modified settlement, in light of Thurston.

After remand, Pan Am and the EEOC proffered a new consent decree that they told the district court was "virtually identical" to the previous one. Indeed, it was in most respects. The EEOC admits that, despite the passage of nearly two years and this Court's decisions in Thurston and Criswell, in renegotiating the settlement it felt constrained only by its agreement to the earlier settlement not to insist on substantial increase in monetary payment to the claimants. See Pet. Append. at A 15-17. Thus, in 1985, a new settlement was reached that adjusted the monetary payments only modestly to compensate for the passage of time. No adjustment was made for the increased value of the former pilots' claims in light of

Thurston and Criswell; and no adjustment was made to take account of the claimants' decreasing likelihood of returning to work as Flight Engineers. Pet. Append. at A 15.

Pan Am and the EEOC again proffered their settlement in the form of a consent decree to the district court for entry as a judgment. They specifically conceded that the standard for the district court's review was whether the consent decree was "an appropriate, fair and just resolution" of the case. Chief Judge Robert F. Peckham, who now was assigned the case, held that it was not. He so ruled after careful consideration of the facts and law, stating his reasons in a careful and thorough opinion. Pet. Append. at A 8-34.

He had little difficulty with the proposed injunctive provisions of the

consent decree. He did not presume to decide the underlying merits of the lawsuit. However, in light of the strong evidence of Pan Am's liability given this Court's Thurston and Criswell decisions, Judge Peckham held that the $1.5 million interest-free installment payments to the claimants was so inadequate as to be unreasonable. Id. at A 34. This was especially so in light of Pan Am's admitted potential exposure for back pay alone of more than $26 million for back pay to the date of the "fairness" hearing alone. And, the district court found Pan AM's potential exposure was in fact much greater, given the strong claims for liquidated double damages and prejudgment interest. Pet. Append. at A 20-29. The EEOC's unwillingness or inability to negotiate for more money for the claimants, and the well founded

objections of more than a majority of the claimants, were additional factors underlying the district court's decision. Id. at A 15-17, A 20-21, A 34.

Pan Am again appealed, this time asserting that the district court abused its discretion in its choice of the standard for reviewing the settlement and in finding that the settlement was too inadequate to accept.

The EEOC again did not appeal. Indeed, before the Ninth Circuit, the EEOC asserted that the district court had not abused its discretion, specifically stating that:

> [W]e are not prepared to say that the district court employed an erroneous standard or erred in ruling that, under any formulation, it must assess the reasonableness of the decree."
>
> Append. hereto at A 16 (citation omitted).

> Though we believe ... the decree we entered was reasonable, we are not prepared to say that the [district] Court's conclusion, reached from a different perspective, amounted to an abuse of discretion.

Id. at A 18.

The facts and circumstances of this case are extremely unlikely to be replicated. Further, this case presents an occasion in which interlocutory appellate review is not likely to lead to a different result. Moreover, this is not a case in which the district court's decision renders further settlement of the case impossible or improbable. Nor is the district court requiring the parties to go ahead to a trial conducted almost certainly according to incorrect legal standards and premises.

In these respects, as well as many others, this case is very different from Carson v. American Brands, Inc., 450 U.S.

79, 87 n.12 (1981). Accord United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980); United States v. City of Miami, 614 F.2d 1322 (5th Cir. 1980), aff'd in relevant part and vacated and remanded in part, 664 F.2d 435 (5th Cir. 1981). Compare Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO v. City of Cleveland, 478 U.S. ___, 92 L.Ed.2d 405 (1986).

B. The Ninth Circuit's Decision in This Case Makes No In-Roads Into Any Strong Policy Favoring Settlement.

Contrary to Pan Am's argument, given the circumstances of this case, the Ninth Circuit's decision makes no inroad into "Congress' 'strong preference for encouraging voluntary settlement of employment discrimination claims' under Title VII." Local No. 93, 92 L.Ed.2d at

420. (Emphasis added).[10/] This case can still be settled, but not for the plainly

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10/ In its Petition for Writ of Certiorari, Pan Am has made frequent misuse of authorities. Many such instances are elucidated in subsequent arguments. Two other examples are noted here.

As quoted in the Petition, the material language from Local No. 93 quoted in the text immediately above is recited as follows:

> In Local No. 93 v. City of Cleveland, 106 S.Ct. at 3073, this Court reiterated the basis for its holding in Carson: "a District Court's order denying entry of a consent decree is appealable under 28 U.S.C. § 1292(a)(1) because such an order undermines Congress' 'strong preference for encouraging voluntary settlement of employment discrimination claims'" (citation omitted; emphasis added).
>
> Pet. at A 16.

The "citation omitted" in the Petition was the phrase "under Title VII." Yet, the instant case arises under the ADEA, not Title VII. And, Pan

(Footnote Continued)

inadequate monetary relief offered by Pan Am.

(Footnote Continued)

Am cites no authority concerning a strong policy promoting voluntary settlement of ADEA claims. Assuming such policy exists -- and we do not necessarily say it should not -- the ADEA also includes an especially strong policy favoring monetary make-whole remedies for claimants. After all, for many ADEA claimants, money, rather than injunctive relief, is all the relief they can anticipate, given their rapidly diminishing employment opportunities. See, e.g., Goldstein v. Manhattan Industries, Inc., 758 F.2d 1435 (11th Cir. 1985), reh. denied; Cancellier v. Federated Department Stores, 672 F.2d 1312, 1319-20 (9th Cir.), cert. denied, 459 U.S. 859 (1982); Gabrielle v. Chrysler Corp., 573 F.2d 949, 954 (6th Cir. 1978).

For another egregious misuse of authority, compare the Petition at 7 n. 8 with the EEOC's correct analysis of certain cases, Append. hereto at A 17-18 n.9. Accord Pet. Append. at A 19.

II. The Ninth Circuit's Holding That Appellate Jurisdiction Is Lacking Under 28 U.S.C. § 1292(a)(1) Does Not Conflict With the Decision of This Court in Carson Or With Any Post-Carson Decisions In Other Circuits.

A. The Ninth Circuit's Decision Does Not Conflict With This Court's Carson Decision.

Contrary to Pan Am's arguments, Pet. at 10-21, the Ninth Circuit's holding in this case does not conflict with this Court's decision in Carson v. American Brands, Inc., 450 U.S. 79 (1981). The Ninth Circuit's analysis of Carson is impeccable. See Pet. Append. at A 3-7. Further, it is clear that section 1292(a)(1) ordinarily does not authorize immediate appeal of interlocutory orders that merely delay, but do not finally adjudicate, claims for injunctive relief. Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc., 385 U.S. 23

(1966), cited in Carson, supra, 450 U.S. at 84.

Pan Am can show only that the district court's order refusing to enter the 1985 Consent Decree has the practical effect of delaying an injunction under the ADEA to plaintiff EEOC. The EEOC has not appealed. And, unlike the situation in Carson, the district court has not precluded the EEOC from securing its injunction hereafter; nor has it precluded Pan Am from securing its secondary injunction against collective bargaining agents.

Thus, as the court of appeals held here, Pan Am cannot even show that it will suffer irreparable harm if immediate review is denied. See In re Feit & Drexler, Inc., 760 F.2d 406, 412 (2d Cir. 1985). Unlike the appealing party in

Carson, it has not even lost the right to settle this case without a trial.

Even assuming, arguendo, that Pan Am has irretrievably lost the opportunity to settle this case without a trial, the delay and additional expense associated with a trial do not themselves constitute the kind of irreparable harm necessary to make an immediate appeal available under Carson. See United States v. Western Electric Co., 777 F.2d 23, 30 (D.C. Cir. 1985); Sentry Life Ins. Co. v. Borad, 759 F.2d 695, 698 (9th Cir. 1985). Cf. Federal Trade Com'n v. Standard Oil Co., 449 U.S. 232, 244 (1980).

B. This Case Presents No Conflict Among the Circuits As to Appellate Jurisdiction Under 28 U.S.C. § 1292(a)(1) Or the Meaning of This Court's Decision in Carson on That Subject.

Contrary to Pan Am's arguments, the Ninth Circuit's decision also does not conflict with the decisions of other Circuits as to the meaning of Carson or to the availability of appellate jurisdiction under section 1292(a)(1). In making its argument for a conflict among the Circuits, Pan Am cites only In re International House of Pancakes Litigation, 487 F.2d 303 (8th Cir. 1973) (see Petition at 8 n.9 and 10), and Donovan v. Robbins, 752 F.2d 1170 (7th Cir. 1985) (see Petition at 8, 10 and 14). Neither case evidences a conflict with the Ninth Circuit's decision or reasoning in this case.

Pan Am's reliance on the International House of Pancakes decision cannot be taken seriously. As this Court observed in Carson, 350 U.S. at 823 n.6, there was "no discussion of [the] jurisdictional question" in International House of Pancakes. In fact, that decision -- all of a single page long -- does not reveal whether the appellate jurisdictional issue was even raised or contemplated, or whether jurisdiction was exercised under section 1292(a)(1) or section 1291. The opinion was a kind of afterthought justifying a summary affirmance of the district court's refusal to enter a settlement. Surely that cryptic pre-Carson decision (cited in Carson as a "see also" case, ibid.) cannot now be relied upon as establishing

a conflict between the Eighth and Ninth Circuits now, after Carson. 11/

Pan Am's reliance on Donovan v. Robbins, 752 F.2d 1170 (7th Cir. 1985) to demonstrate a conflict among the Circuits is equally unavailing. The circumstances of this case and Donovan are so different as to belie Pan Am's contention that "the Ninth Circuit's reasoning therefore conflicts with that of the Seventh Circuit." Pet. at 10.

In Donovan, which involved an ERISA dispute, the district court rejected a settlement in the form of a consent

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11/ Pan Am makes much of the fact that, like here, the defendant in International House of Pancakes appealed the refusal of the consent decree. Pet. at 8 n.9. Nothing in the decision reveals whether the settling plaintiffs, as here, opposed the appeal, or whether the district court's refusal of the consent decree denied defendant or plaintiffs injunctive relief.

decree reached by the plaintiff, the United States Secretary of Labor, and some of the defendants, current trustees of an employee benefit fund. The consent decree included injunctive and monetary provisions. Other defendants objected to the settlement, and the district court rejected it.

Unlike the circumstances of the present case, the appeal was by both the settling defendants and the plaintiff, the Secretary of Labor, who would have benefited from the injunction.

The Seventh Circuit concluded that it had appellate jurisdiction, in that the rejection of that consent decree in Donovan satisfied all the Carson requirements: (1) denial to the appealing parties of the benefits of an injunction, 752 F.2d at 1172-74; (2) the existence of serious irreparable injury

which would justify entry of a preliminary injunction, 752 F.2d at 1173-76; and (3) the need for immediate appeal to avoid mootness, in that delay might keep unchallenged aspects of the settlement from holding together, 752 F.2d at 1176 (by implication).

The circumstances here are very different. First, Pan Am, the only appellant here, has not been denied an injunction within the meaning of section 1292(a)(1); the EEOC, a non-appealing party, has been denied an injunction temporarily. Second, Pan Am certainly is not suffering irreparable injury of the type that would justify entry of a preliminary injunction. It simply is being denied the benefits of a cheap settlement. Third, here, Pan Am will be able to appeal if it loses after any trial and the district court denies

it injunctive relief against ALPA and FEIA. Given these differences, there is no conflict, even in reasoning, between the Donovan decision and the Ninth Circuit's decision here.

III. The Ninth Circuit's Holding That Appellant Is Lacking Under the Collateral Order Doctrine of 28 U.S.C. § 1291 Does Not Present a Significant Or Important Recurring Issue Concerning the Appealability of District Court Orders Refusing To Enter Consent Decrees, and There Exists No Conflict Among The Circuits on That Issue.

A. This Case Presents No Significant or Important Recurring Issue of Law Concerning Appellate Jurisdiction Under 28 U.S.C. § 1291.

The collateral order doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), and 28 U.S.C. § 1291 simply is not available to Pan Am in this case. To fall within this "narrow exception" to the finality rule,

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981), "an order must at a minimum satisfy three conditions: It must 'conclusively determine the disputed question,' 'resolve an important issue completely separate from the merits of the action,' and 'be effectively unreviewable on appeal from a final judgment.'" Richardson-Merrell, Inc. v. Koller, 472 U.S. ___, 86 L.Ed.2d 340, 346 (1985). The district court order that Pan Am seeks to appeal does not pass muster under this three-part test.

Because the district court's disapproval of the consent decree does not foreclose the parties' options "to proceed with the litigation, or to propose a different settlement," Seigal v. Merrick, 590 F.2d 35, 37 (2d Cir. 1978), there clearly has been no "complete, formal and, in the trial

court, final rejection" of any claimed right, Firestone, supra, 449 U.S. at 376. Moreover, the only possible "right" Pan Am can claim here is the "right" to end this litigation on terms it finds comfortable, over the objections of large numbers of the ADEA claimants. No such "right" exists. "[T]he expense and annoyance of litigation is part of the burden of living under government." Federal Trade Com'n v. Standard Oil Co., 449 U.S. 232, 244 (1980).

Nor could Pan Am demonstrate the requisite complete severability of the issue on appeal from the main case. As the district court recognized in this case (Pet. Append. at A 20), a court presented with a proposed consent decree for its approval must consider, among other factors, the strength of the parties' respective claims and defenses

as they appear at the time the decree is considered. See Officers for Justice v. Civil Service Commission, 688 F.2d 615, 625 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983). This issue is the central one to be tested at trial. As the Second Circuit observed in Seigal v. Merrick, supra, 590 F.2d at 38, for purposes of section 1291, because "an approval of a compromise ... becomes a final judgment," "a disapproval of a compromise ... is not different from a denial of summary judgment or the grant of a new trial" which are not appealable orders. (Emphasis in original.)

The Ninth Circuit properly read this Court's decision in Carson (see Pet. Append. at A 6-7 n.7) as overuling sub silentio the Ninth Circuit's earlier decision in Norman v. McKee, 431 F.2d 769 (9th Cir. 1970), cert. denied, 401 U.S.

912 (1971), which had held that certain orders disapproving consent decrees are immediately appealable collateral orders under 28 U.S.C. § 1291. Carson and the other recent cases discussed above had drained Norman of its vitality.

Norman had used the flexible, pragmatic approach to the Cohen doctrine epitomized in Gillespie v. United States Steel Corp., 379 U.S. 148, 152-54 (1964), that, in the past decade, this Court repeatedly has rejected, in the Coopers & Lybrand v. Livesay, 437 U.S. 463, 477 n.30 (1978), Firestone, supra, and Richardson-Merrell, supra, decisions, among others, in favor of a rigorous application of the three-part test described above to preserve the longstanding federal judicial policy against piecemeal appellate review.

Further, since this Court's decision in Carson provides for interlocutory appeals of many (probably most) district court orders refusing to enter consent decrees under section 1292(a)(1), the question of availability of section 1291 jurisdiction hardly raises a significant or important recurring question of law.

B. This Case Presents No Current Conflict Among the Circuits Concerning Appellate Jurisdiction Under 28 U.S.C. § 1291.

Pan Am's contends, despite the Ninth Circuit's rejection of its own earlier decision in Norman, that a conflict now exists among the Circuits on the question of section 1291 appellate jurisdiction over orders refusing to enter consent decrees. Pet. at A 18-21. Pan Am's position is perverse. The only conflict Pan Am cites among the Circuits on this

subject is the supposed conflict between the Ninth Circuit's 1970 decision in Norman and the Second Circuit's 1978 decision in Seigal. Both cases pre-date Carson (1981), and were cited in it to evidence a conflict existing among Circuits at the time Carson was decided. They hardly demonstrate a present conflict among the Circuits on the issue. Indeed, the Ninth Circuit's decision in this case now squares its approach with that of the Second Circuit in Seigal. Hence, Pan Am has shown no conflict between those Circuits.

CONCLUSION

For all of the foregoing reasons, Pan Am's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

SANFORD JAY ROSEN
(Counsel of Record)
BARBARA Y. PHILLIPS
ROSEN & PHILLIPS

STURDEVANT & ELION
JAMES C. STURDEVANT

Attorneys for Former
Pan American Pilots/
Claimants

DATED: October 27, 1986

A P P E N D I X

[FILED MAR 6, 1984]

IN THE UNITED STATES DISTRICT
NORTHERN DISTRICT OF CALIFORNIA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. PAN AMERICAN WORLD AIRWAYS, INC., et al., Defendants.	NO. C-81-3636-WAI O R D E R
AND RELATED CROSS AND THIRD PARTY ACTIONS.	

On September 28, 1983, a hearing was held in this court to entertain objections to a consent decree proposed by plaintiff EEOC and defendant Pan Am in this action brought under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq., ("ADEA"). During the hearing, defendant/intervenor Flight Engineers International Association, National Airlines Chapter,

("NALFEIA") orally moved to dismiss this action on the grounds that the EEOC lacks authority to maintain the suit.

All parties who have made general and limited appearances have now had opportunity to address both the issues raised by the motion to dismiss and the merits of the proposed consent decree. For reasons herein, the court finds that the EEOC has the authority to bring this action, and the motion to dismiss is accordingly DENIED. The court also finds that the proposed consent decree cannot be entered at this time and is accordingly DISAPPROVED.

I. MOTION TO DISMISS: EFFECT OF CHADHA

NALFEIA has contended that the EEOC lacks the authority to initiate lawsuits to enforce the ADEA because the legislation which transferred to the EEOC its authority to do so contains an

invalid legislative veto. They rely upon the recent case of Immigration and Naturalization Service v. Chadha, __ U.S. __, 103 S.Ct. 2764 (1983), wherein the Supreme Court held unconstitutional a section of the Immigration and Nationality Act, at 8 U.S.C. § 1105a(a), which had authorized either body of Congress to invalidate the U.S. Attorney General's decision to allow an otherwise deportable alien to remain free from deportation. Id. at 2788. The Court held that the veto exercised by the House of Representatives ran afoul of the constitutional mandates of bicameral consideration and presentment. The Court found only the severable one-House veto provision unconstitutional, not the entire act.

NALFEIA also cites EEOC v. Allstate Ins. Co., 570 F.Supp. 1224 (D.C. S.D.

Miss. 1983), U.S. App. Pending, Dec. 15, 1983, 52 U.S.L.W. 3512, where the court found unconstitutional the entire Reorganization Act of 1977, 5 U.S.C. § 901 et seq., (the "Act"), which, by way of Reorganization Plan No. 1 of 1978, 92 Stat. 3781, had transferred to the EEOC the power to litigate ADEA suits. In sum, NALFEIA contends that Chadha and Allstate mandate that this court lacks subject matter jurisdiction and must dismiss this action. See, e.g., Pressroom Unions-Printer League Income Security Fund v. Continental Assurance Co., 700 F.2d 889 (2d Cir.), cert. denied, __ U.S. __, 52 U.S.L.W. 3264 (Oct. 3, 1983).

EEOC's opposition is four-pronged: 1) defendants each lack standing to challenge the EEOC's power to sue; 2) the legislative veto provision of the Act is

severable from the remainder of the Act; 3) the veto problem has been cured by subsequent legislative ratification; and 4) Chadha should not be applied retroactively.

EEOC argues especially that, because the legislative veto in the Act was not exercised, movants have suffered no injury in fact. The court finds this reading of Article III's standing requirements is incorrect.

Movants standing is determined by whether they have suffered some actual or threatened injury fairly traceable to the challenged action which is likely redressable. See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, __ U.S. __, 102 S.Ct. 752, 758 (1982), and cases cited therein. The injury in fact herein is not the result of the legislative veto

provision. It is the harm to defendants and intervenors that is threatened by this lawsuit with respect to at least the issue of "rightful place seniority" relief and the burden to be born by parties in this matter who are not the alleged victims of age discrimination.

Regarding Congress' failure to exercise the veto, Congress is bereft of authority once delegated, and "until that delegation is legislatively altered or revoked ...." Chadha, supra, 103 S.Ct. at 2786. Hence, in this this context, the mere inclusion of a clause giving Congress the ability to avoid constitutional mandate is unconstitutional and the court is satisfied that said parties may therefore challenge it.

While there has been no argument set forth to support the continuing viability

of the one-House veto of the Act in light of Chadha, this court does not believe the entire Act is invalid as a result. The question is whether Congress would have enacted the Act in the absence of the invalid veto provision. See Consumer Energy Council v. Federal Energy Regulatory Comm'n., 673 F.2d 425, 442 (D.C. Cir. 1982), aff'd., __ S.Ct. __, 51 U.S.L.W. 395 (June 28, 1983).

The inclusion of a one-House veto in this case is obvious: to restrict the President's ability to alter Congress' reorganization plans which were designed to streamline the powers of administrative agencies. However, there is no conclusive evidence to be drawn from the Congressional Record concerning the importance of the vet to the Act. The record contains a statement by Rep. Drinan that "[t]he one-House veto

provision is deemed to be an integral and necessary part of the legislative scheme for reorganization. That is a proposition to which all agree. H.R. Rep. No. 95-105, 95th Cong., 1st. Sess., reprinted in 1977 U.S. Code Cong. & Ad. News 41, 69 ("H.R."). The record also contains statements by Rep. Brooks which acknowledged the confrontation between the questionable constitutionality of the veto and Congress' concern for maintaining control over reorganization, apparently favoring the latter. 123 Cong. Rec. at 9344.

While the court is inclined to conclude from the record that the import of the Act in toto was great enough such that it would have been enacted absent the veto provision, the court agrees with the conclusion reached by Judge Horton, in Muller Optical Company, et al. v.

EEOC, No. 83-2836 H, (W.D. Tenn. Nov. 10, 1983), that the court's decision herein should also rest on the conclusion that Congress had ratified the transfer of authority to the EEOC by subsequent legislation and legislative references.

Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297, 301-302 (1937), provides that Congress may ratify the President's unauthorized acts by passing appropriate legislation or by making confirmatory references to such acts in subsequent legislation.

Here, two recent duly passed appropriations acts support EEOC's position, in that they indicated the beneficiary of the funds was the enforcement (by the EEOC) of the ADEA and Title VII. Pub. L. No. 97-377, 96 Stat. 1830, 1874 (1982) (ADEA and Equal Pay Act); Publ. L. No. 97-92, 95 Stat. 1192

(1981) (Title VII). There is also an implication, albeit somewhat tenuous, that Congress had ratified the ADEA enforcement authority transfer to the EEOC by leaving it unaffected by the Civil Service Reform Act of 1978, 5 U.S.C. § 1101 note (Supp. IV 1980), which superseded other parts of Reorganization Plans Nos. 1 or 2 of 1978.

The counter-argument is exemplified by Greene v. McElroy, 360 U.S. 474 (1959), wherein the Supreme Court apparently declined to find congressional ratification in areas of "questionable constitutionality," which, in that case, concerned due process rights of persons processed for security clearances. Id. at 506-507. Subsequent cases rejecting ratification have also held that general appropriations bills may not, under certain circumstances, constitute

ratification. See Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978); Andrus v. Sierra Club, 442 U.S. 347 (1979).

The instant case is readily distinguishable. There is no due process issue or aspect of present questionable constitutionality regarding the mere transfer of authority from one executive agency to another. Further, there is no issue of general appropriations as constituting proposed legislation.

Accordingly, the court accepts the contentions of the EEOC regarding severability of the one-House veto from the Act, leaving the balance of the Act in full force and effect, and the subsequent ratification of Reorganization Plan No. 1 of 1978. On this basis, and pursuant to the authority cited herein, the motion to dismiss is hereby DENIED.

II. CONSENT DECREE

The issue in this case is whether Pan Am intentionally discriminated against pilots and co-pilots over age 60 by denying them an opportunity, equal to that of those under age 60, to down-bid for flight engineer positions. A fundamental reason asserted by the EEOC and by Pan Am in support of the proposed settlement at this point is the uncertainty of law regarding this issue.

This Circuit has provided some direction, see Criswell v. Western Air Lines, etc., 514 F.Supp. 389, aff'd., 709 F.2d 544 (9th Cir. 1983). However, in light of the recent Supreme Court position on the same issue, Air Line Pilots Association v. Trans World Airlines, 713 F.2d 940 (2d Cir.), cert. granted, No. 83-997, Feb. 24, 1984, the court is reluctant to venture into

uncharted waters by approving of the proposed settlement at this time.

Accordingly, the consent decree is hereby DISAPPROVED. The parties are requested to refrain from filing further pleading or memoranda pending the imminent reassignment of this case to another Northern District court.

DATED: 3 6 84

/William A. Ingram
WILLIAM A. INGRAM
United States District Judge

EXCERPT FROM PAGES 12-14, 18
OF EEOC BRIEF IN THE NINTH CIRCUIT

... We believe that the best formulation is that set forth in City of Alexandria, discussed above.8/ Although it is

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8/ Pan Am's position on this issue is less than crystalline. On the one hand, it suggests that the district court must approve such a decree absent evidence of fraud, collusion or unlawful provisions in the decree (br. at 20); on the other, it cites City of Alexandria. (br. at 20 n. 13). It also relies on U.S. v. Hooker Chemicals & Plastic Co., 607 F.Supp. 1052, 1057 (W.D.N.Y. 1985), holding that "the function of the reviewing court is ... to assure itself that the terms of the decree are fair and adequate and are not unlawful, unreasonable or against public policy," and on U.S. v. Ketchikan Pulp Co., 430 F.Supp. 83, 86 (D. Alaska 1977), which specifically rejected the notion that the court should approve the decree unless it finds the agency guilty of bad faith or malfeasance. Pan Am also suggests that "because the objecting claimants' right to bring ADEA action was terminated when the EEOC filed suit, this case is no different than an action brought by any other federal agency,"
(Footnote Continued)

arguably no more than the inverse of the "fair, reasonable and adequate standard" (See United States v. City of Miami, 664 F.2d 435, 440-41 (5th Cir. 1981) (en banc)), it seems to us more effectively [sic] to remind the trial court that its role is limited and that a consent decree proposed by EEOC "carries with it a presumption of validity."

However, the district court here cited City of Alexandria with approval, as a standard to guide it. It also stated that its role was not to resolve the merits of the underlying dispute and recognized the preference for voluntary settlements and the deference to be accorded the government's participation,

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(Footnote Continued)

citing SEC v. Randolph, 736 F.2d at 529 and Marshall v. Holiday Magic, 550 F.2d at 1178. (Pan Am Br. 24-25).

under the law of this Circuit. (C.R. 395 at 14-15). Although we would urge this Court to adopt the City of Alexandria formulation, we are not prepared to say that the district court employed an erroneous standard or erred in ruling (C.R. 395 at 14; E.R. 259) that, under any formulation, it must assess the reasonableness of the decree.[9/]

9/ To the extent that Pan Am is arguing that a trial court must conclusively presume that an ADEA decree entered into by the government is fair, adequate and reasonable, because claimants "have no right to object" (Pan Am br. at 21-28) in such actions once the government has brought suit, we disagree. In the first place, a consent decree is an adjudication (see supra n.14) and courts cannot be expected to blindly lend their authority to acts of the parties -- even where one is the government.

Moreover, although Pan Am correctly notes that courts have usually declined to let claimants intervene as parties in ADEA or FLSA actions (Pan Am br. at

(Footnote Continued)

* * * *

(Footnote Continued)

17-19), many--including some of those on which Pan Am relies--have permitted at least limited participation, as the district court did here. E.g., EEOC v. Boeing Co., ____ F.Supp. ___, 37 FEP Cases 1657 (W.D. Wash. 1985). Indeed, the D.C. Circuit Court, in an unpublished opinion (see attachment), reversed the district court's refusal to permit intervention in Marshall v. U.S.P.S., 481 F.Supp. 1037 (D.D.C. 1979).

Only EEOC v. Consolidated Edison Co., 557 F.Supp. 468 (S.D.N.Y. 1983), provides any support for the proposition that ADEA claimants have a lesser right to object to decrees entered into by the government than do other claimants, and even there there is a suggestion that the court was influenced by its belief that the claimants had little likelihood of success on the merits. Id. at 474. EEOC v. Eastern Airlines, 97 F.R.D. 646 (S.D. Fla. 1983), appeal dismissed, 736 F.2d 635 (11th Cir. 1984), on which Pan Am relies, actually refutes Pan Am's argument. We agree with the district court (C.R. 395 at 16; E.R. 26) that the court there based its refusal to permit intervention primarily on its finding that EEOC's representation was manifestly adequate in that the decree itself was fair, adequate and reasonable, and not, as Pan Am suggests (br. at 24 n. 16) that

(Footnote Continued)

Though we believe, for the reasons stated above, that the decree we entered was reasonable, we are not prepared to say that the [district] court's conclusion, reached from a different perspective, amounted to an abuse of discretion. ...

(Footnote Continued)

"by statute, EEOC was an adequate representative."